Stealth Solutions Sdn Bhd v Yayasan Islam Negeri Kedah

HIGH COURT (SHAH ALAM) — WRIT OF SUMMONS NO 22NCVC-677–12 OF 2015
AZIMAH OMAR JC
11 APRIL 2016

Contract — Formation — Whether there was a contract — Whether negotiations and conduct between parties for a joint venture project resulted in a concluded contract — Whether parties merely had an unenforceable memorandum of understanding — Whether defendant's letter to plaintiff appointing it to enter into a joint venture merely a letter of intent containing a record of terms and an intention to negotiate further — Whether plaintiff's own conduct showed that it did not think it had a concluded joint venture agreement with defendant — Whether plaintiff not entitled to apply for interim interlocutory injunction against defendant pending disposal of main suit because it failed to show it had a cause of action or a serious question to be tried

The plaintiff sued the defendant for, inter alia, an order of specific performance of an alleged joint venture agreement ('JVA') to build telecommunication towers ('telco towers') and other related facilities in Kedah ('the project'). After filing the suit, the plaintiff applied ('encl 5') for an interlocutory injunction to prevent the defendant from awarding the project to any other party pending the disposal of the suit. Alternatively, it sought by the injunction to preserve any income or profits the defendant might receive if it did award the project to a third party. In its defence to the suit and in opposing encl 5, the defendant denied that there was any concluded contract between the parties and contended that, at most, all that they had was a memorandum of understanding to negotiate for a JVA. The defendant said that as the plaintiff did not have a cause of action or a serious question to be tried, encl 5 should be dismissed. The chronology of events showed that the defendant had invited the plaintiff and four other companies to present proposals for a JVA for the project. Following their presentations, the defendant wrote to the plaintiff ('the 18 December 2014 letter') stating that it agreed to enter into a joint venture with the plaintiff to carry out the project based on certain terms and conditions. The plaintiff substantially agreed to the proposed terms and conditions but disagreed on the number of directors the proposed joint venture company should have. The defendant later sent a letter to the plaintiff and another company enclosing a project planner for the project and listing out the sites of telco towers in Kedah to enable the companies to carry out due diligence for the acquisition of those towers by a joint venture company when it was formed. Before any formal JVA was signed or a joint venture company was formed, the plaintiff issued emails ('the 7 January 2015 emails') — which

were not copied to the defendant — to several telecommunications companies stating that it was 'the appointed vendor by the State' to buy over existing telecommunications sites in Kedah. It was the defendant's displeasure over the emails and its assertion that there was no concluded JVA between the parties that led the plaintiff to file the instant suit.

Held, dismissing encl 5:

(1) It was clear from the documentary evidence that there was no concluded contract between the parties as the terms of the joint venture were never concluded with certainty. The plaintiff therefore had no cause of action against the defendant. The plaintiff had admitted that there was no formal JVA executed between by the parties but in its attempt to prove that there was a concluded JVA, it had mainly and only relied on the fact that there was an offer/appointment by the defendant, an acceptance by the plaintiff and a certainty of parties (see paras 19, 34 & 36).

(2) The plaintiff's acceptance of the defendant's offer to enter into a JVA merely amounted, and was of a similar nature, to a memorandum of understanding. An MOU was no more than an agreement to negotiate and was unenforceable. The defendant had every right not to proceed with the MOU, more so when the plaintiff had acted unilaterally without the defendant's knowledge and authorisation by liaising directly with telecommunications providers via the 7 January 2015 emails (see paras 34–35).

(3) The defendant's 18 December 2014 letter merely appointed the plaintiff to enter into a proposed joint venture with the defendant for the project. It was essentially a 'letter of intent' containing an intention to negotiate, or a 'record of terms', even if it was accepted by the plaintiff. The words used in the letter were only indicative of a proposed JVA without anything being concluded. The plaintiff acknowledged the appointment but introduced other conditions of the joint venture which differed from those set out by the defendant. The plaintiff's conduct in sending the defendant a draft JVA and a copy of the Form 32A of the proposed joint venture company was an unwarranted unilateral conduct by the plaintiff which was never in the contemplation, negotiation, or even the request, of the defendant. The plaintiff's own letter to the Kedah Menteri Besar clearly showed that there was not yet any conclusive contract between the parties (see paras 23–24, 29, 31 & 33).

(4) Since there had to be a pre-existing cause of action before the relief of interlocutory injunction could be granted, the plaintiff was not entitled to the injunction. Not only had the plaintiff no cause of action against the defendant, it went a step further to conduct a wrongdoing in unilaterally

pursuing to bind the non-existent contract against the defendant. As such, the saving arms of equity could not be afforded to the plaintiff (see paras 37, 40 & 42).

[Bahasa Malaysia summary

Plaintif telah menyaman defendan untuk, antara lain, satu perintah pelaksanaan spesifik satu perjanjian usahama yang dikatakan ('PUS') bagi membina menara komunikasi ('menara telco') dan kemudahan berkaitan yang lain di Kedah ('projek tersebut'). Selepas memfailkan guaman tersebut, plaintif telah memohon ('lampiran 5') untuk injunksi interlokutori bagi menghalang defendan daripada mengawardkan projek tersebut kepada mana-mana pihak sehingga selesai guaman tersebut. Secara alternatif, ia memohon melalui injunksi untuk memelihara apa-apa pendapatan atau keuntungan yang mungkin diterima oleh defendan jika ia memang mengawardkan projek tersebut kepada pihak ketiga. Dalam pembelaannya terhadap guaman tersebut dan dalam membantah lampiran 5, defendan telah menafikan bahawa terdapat apa-apa kontrak yang telah dibuat antara pihak-pihak dan berhujah bahawa, paling tidak, apa pun yang mereka adalah adalah surat memorandum persefahaman untuk berunding tentang suatu PUS. Defendan mengatakan bahawa oleh kerana plaintif tidak mempunyai kausa tindakan atau persoalan serius untuk dibicarakan, lampiran 5 patut ditolak. Kronologi kejadian menunjukkan bahawa defendan telah mempelawa plaintif dan empat syarikat lain untuk membentangkan cadangan bagi satu PUS untuk projek tersebut. Berikutan pembentangan mereka, defendan telah menulis kepada plaintif ('surat 18 Disember 2014') menyatakan bahawa ia bersetuju untuk memasuki usahasama dengan plaintif bagi menjalankan projek tersebut berdasarkan terma dan syarat tertentu plaintif kemudian telah bersetuju dengan terma dan syarat yang dicadangan itu tetapi tidak bersetuju berhubung bilangan pengarah yang patut ada dalam syarikat usahasama itu. Defendan kemudian telah menghantar surat kepada plaintif dan satu lagi syarikat dengan melampirkan perancang projek untuk projek tersebut dan menyenaraikan tapak-tapak menara telco di Kedah bagi membolehkan syarikat-syarikat menjalankan usaha yang wajar untuk pengambilalihan menara-menara tersebut oleh syarikat usahasama apabila ia ditubuhkan. Sebelum apa-apa PUS rasmi ditandatangani atau suatu syarikat usahasama ditubuhkan, plaintif telah mengeluarkan emel-emel ('emel-emel 7 Januari 2015') — yang tidak disalinkan kepada defendan — kepada syarikat-syarikat telekomunikasi yang menyatakan bahawa ia adalah 'the appointed vendor by the State' untuk membeli tapak-tapak telekomunikasi yang sedia ada di Kedah. Kedah tidak berpuas hati dengan emel-emel tersebut dan penegasannya bahawa tiada PUS telah dibuat antara pihak-pihak yang telah membawa kepada plaintif memfailkan guaman ini.

Diputuskan, menolak lampiran 5:

(1) Ia jelas daripada keterangan dokumentar bahawa tiada kontrak telah dibuat antara pihak-pihak kerana terma-terma usahasama tidak pernah membuat kesimpulan yang pasti. Plaintif dengan itu tidak mempunyai kausa tindakan terhadap defendan. Plaintif mengakui bahawa tiada PUS yang rasmi telah dilaksanakan antara pihak-pihak tetapi dalam percubaan untuk membuktikan bahawa terdapat PUS yang dibuat, ia bergantung terutamanya dan hanya kepada fakta bahawa terdapat tawaran/pelantikan oleh defendan, suatu penerimaan oleh plaintif dan kepastian pihak-pihak (lihat perenggan 19, 34 & 36).

(2) Penerimaan plaintif terhadap tawaran defendan untuk memasuki PUS hanya merupakan, dan sama sifatnya, dengan suatu memorandum persefahaman ('MOU'). Suatu MOU tidak lebih daripada suatu perjanjian untuk berunding dan tidak boleh dikuatkuasakan. Defendan mempunyai hak untuk tidak meneruskan dengan MOU itu, lebih-lebih lagi apabila plaintif telah bertindak secara unilateral tanpa pengetahuan dan kebenaran defendan dengan berhubung secara langsung dengan pembekal-pembekal telekomunikasi melalui emel-emel 7 Januari 2015 (lihat perenggan 34–35).

(3) Surat 18 Disember 2014 defendan hanya melantik plaintif memasuki usahasama yang dicadangkan dengan defendan untuk projek tersebut. Ia pada dasarnya suatu 'letter of intent' yang mengandungi niat untuk berunding, atau suatu 'record of terms', walaupun jika ia diterima oleh plaintif. Kata-kata yang digunakan dalam surat tersebut hanya menunjukkan suatu PUS yang dicadangkan tanpa apa-apa diputuskan. Plaintif mengakui pelantikan itu tetapi memperkenalkan syarat-syarat lain usahasama tersebut yang berbeza daripada yang ditetapkan oleh defendan. Tingkah laku plaintif yang menghantar kepada defendan satu draf PUS dan sesalinan Borang 32A berhubung syarikat usahasama yang dicadangkan itu adalah satu tingkah laku unilateral yang tidak berasas oleh plaintif yang tidak pernah dijangka, dirunding, malah diminta, oleh defendan. Surat plaintif sendiri kepada Menteri Besar Kedah jelas menunjukkan bahawa masih tiada apa-apa kontrak yang konklusif antara pihak-pihak (lihat perenggan 23–24, 29, 31 & 33).

(4) Oleh kerana terdapat kausa tindakan yang telah sedia ada sebelum relif injunksi interlokutori boleh diberikan, plaintif tidak berhak mendapat injunksi tersebut. Bukan sahaja plaintif tiada kausa tindakan terhadap defendan, malah ia ke satu langkah lagi menjadi satu tingkah laku yang salah secara unilateral diteruskan untuk mengikat kontrak yang tidak wujud terhadap defendan. Oleh itu, ekuiti sabagai penyelamat tidak dapat diberikan kepada plaintif (lihat perenggan 37, 40 & 42).]

Notes

For cases on formation in general, see 3(3) *Mallal's Digest* (5th Ed, 2015) paras 5023–5202.

Cases referred to

Abdul Rahim bin Syed Mohd v Ramakrishnan Kandasamy (Wan Ahmad Azlan bin Wan Majid & Anor, interveners) and another action [1996] 3 MLJ 385, HC (refd)

American Cyanamid Co v Ethicon Ltd [1975] 1 All ER 504, HL (refd)

Ayer Hitam Tin Dredging Malaysia Bhd v YC Chin Enterprises Sdn Bhd [1994] 2 MLJ 754, SC (folld)

Cipta Cermat Sdn Bhd v Perbadanan Kemajuan Negeri Kedah [2007] 2 MLJ 746; [2007] 1 CLJ 498, CA (refd)

Courtney and Fairbairn Ltd v Tolaini Brothers (Hotels) Ltd and another [1975] 1 WLR 297, CA (refd)

Eastern Properties Sdn Bhd v Hampstead Corporation Sdn Bhd [2007] 6 CLJ 538, CA (refd)

Kanawagi s/o Seperumaniam v Penang Port Commission [2001] 5 MLJ 433, HC (refd)

Kheamhuat Holdings Sdn Bhd v The Indian Association, Penang [2006] 4 MLJ 656, CA (refd)

Kho Ah Soon v Ooi Kar Seng (Properties) Sdn Bhd [1995] 3 MLJ 293; [1995] 3 CLJ 812, CA (refd)

Lim Chong Construction Co Sdn Bhd v Silam Quarry Sdn Bhd [1990] 2 MLJ 423, HC (refd)

MN Guha Majumder v Re Donough [1974] 2 MLJ 114 (refd)

Siskina (Owners of Cargo Lately Laden on Board) and others v Distos Compania Naviera SA [1979] AC 210, HL (refd)

Legislation referred to

Companies Act 1965
Companies Regulations 1966 Form 32A
Enactment Bil 10 of 1976

Megat Abdul Munir (Mohd Shahir Md Tahir with him) (Zain Megat & Murad) for the plaintiff.

Sabarina Samadi (Wong Hai Ling with her) (Zaid Ibrahim & Co) for the defendant.

Azimah Omar JC:

BACKGROUND FACTS

[1] The plaintiff (Stealth Solutions Sdn Bhd) is a company registered under the Companies Act 1965 having its registered address at 5-21, Jalan PJU 6,

Pusat Perdagangan Pelangi Square, Pelangi Damansara PJU 6, Persiaran Surian, 47800 Petaling Jaya, Selangor Darul Ehsan and/or business address at Unit B-3A-02, Arena Mentari, No 1, Jalan PJS 8/15, Dataran Mentari Bandar Sunway, 46150 Petaling Jaya, Selangor Darul Ehsan.

[2] The defendant (Yayasan Islam Negeri Kedah) is a state foundation formed under Enactment Bil 10 of 1976 by the Kedah State Assembly having its address at Bangunan Yayasan Islam Negeri Kedah, No 56A, Jalan Telok Wanjah, 05200 Alor Setar Kedah Darul Aman.

[3] In its statement of claim ('the main suit'), the plaintiff pleaded that the plaintiff and the defendant had entered into a joint venture agreement ('said joint venture') for the construction of telecommunication towers/structures and other related facilities in Kedah. One of the reliefs sought by the plaintiff against the defendant in the main suit is for the specific performance of the said joint venture agreement.

[4] The defendant has vigorously refuted the plaintiff's claim. Primarily, in refuting the plaintiff's claim, the defendant denied the existence of any joint venture agreement between the plaintiff and the defendant. In its statement of defence, the defendant pleaded that there is no binding agreement or contract between the plaintiff and the defendant. The relationship between the plaintiff and the defendant can be described as, the plaintiff has accepted the defendant's offer to enter into a joint venture agreement and at best it only amounts to memorandum of understanding ('MOU'). The defendant also pleaded that there is merely a draft joint venture agreement which has neither been vetted nor approved by the defendant.

[5] Pending the disposal of the main suit, the plaintiff filed an application in encl 5 seeking, inter alia, for the following orders:

(a) an order for an injunction to prevent the defendant from awarding and/or causing the project to be awarded to a third party until the decision and/or disposal of this action; and

(b) in the alternative, an interim preservation of all income and/or profits which will be received by the defendant from the project if the defendant awards the project and/or cause the project to be awarded to third party.

[6] The plaintiff's application in encl 5 is supported by the affidavit in support affirmed by Md Juzaily bin Md Ramli on 18 December 2015, the plaintiff's chief operating officer.

A [7] To appreciate and for a better understanding of the matter at hand, it would be apt for this court to first set out the chronology of the events which has led to the filing of the main suit as well as the application for interim injunction by the plaintiff:

B (a) on 9 November 2014, the defendant had invited the plaintiff together with four other companies to brief the defendant's investment special committee on a joint venture proposal with regard to the construction of telecommunication towers infrastructures for whole state of Kedah;

C (b) the plaintiff had accepted the invitation and subsequently on 21 November 2014, the plaintiff presented their proposal to the defendant's investment special committee at Bilik Menteri, Aras 1, Hotel Holiday Villa, Alor Setar, Kedah;

D (c) after the plaintiff's presentation, the defendant wrote a letter dated 18 December 2014 to the plaintiff. In this letter, the defendant had basically agreed to appoint the plaintiff to enter into a joint venture with the defendant for the said project;

E (d) close perusal at the contents of the 18 December letter reveals that, basically the defendant has informed the plaintiff that the defendant had agreed to enter into a joint venture with the plaintiff and it has set out the terms of the joint venture as follows:

(i) methods of the joint venture:

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No	Descriptions	Plaintiff
1	Equity to the defendant	35%
2	Contribution towards the existing towers	RM30,000/per tower
3	Contribution towards new towers	RM25,000/per tower
4	Monthly contributions	RM1,000/per tower
5	Numbers of board of directors	3:7

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(ii) the defendant's representative shall hold the post of chairman of the board of directors of the company;

H (iii) majority decision from all of the board of directors must be obtained in approving any motions;

(iv) commitment money of RM500,000 to be paid by the plaintiff when signing the agreement;

I (v) the plaintiff will operate in a zone consisting the following districts:

(1) Kota Setar;

(2) Kubang Pasu;

(3) Langkawi;

(4) Pendang;

(5) Padang Terap; and

(6) Pokok Sena.

(e) the plaintiff by its letter dated 23 December 2014 had responded to the defendant's 18 December letter. In its letter substantially, the plaintiff has agreed to the joint venture's terms but has made slight modifications, in particular with regards to the number of board of directors:

(i) Methods of the joint venture:

	Joint venture company	Stealth YINK Sdn Bhd
Equity	Stealth Solutions — 65%	YINK — 35%
2	Contribution towards the existing towers	RM30,000/per tower
3	Contribution towards new towers	RM25,000/per tower
4	Monthly contributions	RM1,000/per tower
*Numbers of board of directors	4	3

(ii) agreed that the defendant's representative shall hold the post of chairman of the board of directors of the company;

(iii) agreed that the majority decision from all of the board of directors must be obtained in approving any motions;

(iv) agreed to pay the commitment money of RM500,000 upon signing the agreement;

(v) agreed that the plaintiff will operate in a zone consisting the following districts:

1. Kota Setar;
2. Kubang Pasu;
3. Langkawi;
4. Pendang;
5. Padang Terap; and
6. Pokok Sena.

(f) on 23 December 2014, the defendant had issued a letter to the plaintiff to inform the plaintiff that a meeting will be held on 6 January 2015 between all the telecommunication operators with the Menteri Besar at Bilik Gerakan, Aras 4, Blok B Wisma Darul Aman;

(g) by a letter dated 5 January 2015, the defendant had forwarded to the plaintiff and another company, Premium Radius Sdn Bhd the following documents:

(i) project planner for the said project; and

(ii) list of telecommunication towers in Kedah for the plaintiff and Premium Radius.

(h) it must be noted that in this letter, the defendant has specifically stated this;

> Disertakan juga senarai menara telekomunikasi yang terdapat di Negeri Kedah Darul Aman bagi tujuan pihak YBhg Dato'/Tuan untuk membuat Odit Penelitian (*Due Diligence*) bagi tujuan pembelian kesemua menara tersebut oleh syarikat usahasama yang akan dibentuk nanti.

(i) immediately after the meeting on 6 January 2015, the plaintiff had issued an email dated 7 January 2015 to several telecommunications companies stating that the plaintiff was the 'appointed vendor by the State', as follows:

> We, being the appointed vendor by the State has been instructed to purchase all existing sites in Kedah within 6 months with the exception of 180 sites belonging to YIKED Bina Sdn Bhd ...

(j) it must be noted that the plaintiff had sent this email without copying it to the defendant;

(k) on 11 January 2015, the defendant issued a letter to Suruhanjaya Komunikasi dan Multimedia Malaysia ('SKMM') and other telecommunications providers stating, amongst others, that:

(i) the State of Kedah has given a mandate to the defendant to enter into a joint venture with the plaintiff and Premium Radius to build telecommunications infrastructure in Kedah; and

(ii) the telecommunications providers are requested to provide 'kerja-kerja membina insfrastruktur telekomunikasi, menara dan sebagainya' to the plaintiff and Premium Radius effective 6 January 2015;

(l) on 12 January 2015, the plaintiff sent a draft JVA and a copy of Form 32A of the proposed joint venture company to the defendant;

(m) on 15 April 2015, YB Mohd Rawi had issued a letter to SKMM stating his support for Teras Millenium Sdn Bhd for the project despite their late proposal, as their proposal is better and more beneficial to the defendant in the long term;

(n) pursuant to YB Mohd Rawi's letter dated 15 April 2015, the plaintiff met with the Kedah Menteri Besar on 28 April 2015 to obtain an explanation on the said letter;

(o) on 6 May 2015, the plaintiff issued a letter to the Kedah Menteri Besar stating the following:

> Pihak syarikat berterima kasih di atas penjelasan kedudukan pihak syarikat bagi pelantikan usahasama Yayasan Islam Negeri Kedah dan Stealth membina kemudahan infrastruktur telekomunikasi di Kedah yang masih sah dan berkuatkuasa.
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> Pihak syarikat juga berterima kasih dengan jaminan yang diberikan oleh pihak YB Dato Seri MB Kedah untuk menyegerakan bagi memuktamadkan Perjanjian tersebut.

(p) in or around April 2015, the defendant was made aware of the plaintiff's email dated 7 January 2015. Consequently, the defendant issued a letter to the plaintiff dated 23 June 2015:

(i) reminding the plaintiff that the purchase of the telecommunications towers is to commence in the second week of June 2015 after the JVA is signed and a joint venture company is formed; and

(ii) requesting the plaintiff to provide a reasonable explanation within two weeks regarding the plaintiff's issuance of the email dated 7 January 2015;

(q) the plaintiff gave its explanation to the defendant by a letter dated 30 June 2015, stating that the plaintiff was being proactive and has acted on the realisation of its appointment for the purposes of the joint venture;

(r) however, the defendant, through its solicitors' letter dated 8 September 2015, replied to the plaintiff that the plaintiff had acted unilaterally without the defendant's authority and that there is no contract between the plaintiff and defendant;

(s) the plaintiff, through its solicitors' letter dated 23 September 2015, replied to the defendant stating, amongst others, that the plaintiff had accepted the defendant's offer in relation to the project;

(t) the defendant through its solicitors' letter dated 7 October 2015, reiterated to the plaintiff's solicitors that there is no concluded contract between the plaintiff and the defendant; and

(u) the defendant's solicitor again wrote to the plaintiff on 15 December 2015, reiterating its stance that there are no contractual obligation between the plaintiff and the defendant and also emphasises that

whatever communication or negotiations between the parties are mere negotiations which are subject to a contract.

[8] Hence, it is not surprising that in opposing the plaintiff's application, the defendant has raised these following grounds:

(a) the plaintiff has no cause of action against the defendant.

(b) the plaintiff has failed to meet the requirements in an application for interlocutory injunction because:

(i) there are no serious issues to be tried;

(ii) damages constitute an adequate remedy for the plaintiff (if any); and

(iii) the balance of convenience lies in favour of the defendant;

(c) the plaintiff is not entitled to an order for interim preservation of property.

THE PLAINTIFF HAS NO CAUSE OF ACTION AGAINST THE DEFENDANT

[9] The defendant has contended that the plaintiff has no basis to seek for an order for interlocutory injunction as the plaintiff has no cause of action against the defendant. It was submitted on behalf of the defendant that there is no binding joint venture agreement between the plaintiff and the defendant. The defendant has further contended that the relationship between the plaintiff and defendant has not reached the stage of a formation of any contractual relationship which would enable the plaintiff to seek legal recourse by way of an injunction to prevent the defendant from awarding and/or causing the project to be awarded to a third party until the decision and/or disposal of this action, what more an interim preservation of all income and/or profits which will be received by the defendant from the project if the defendant awards the project and/or cause the project to be awarded to a third party.

[10] The defendant had further contended that the plaintiff is fully conscious and aware that the both plaintiff and the defendant have not executed a formal joint venture agreement ('JVA') for the project and in fact, the plaintiff has admitted that in the plaintiff's own letters dated 30 June 2015, 6 May 2015 and 24 November 2015 wherein the plaintiff stated in the said letters that it is still awaiting the defendant's feedback on the draft JVA.

[11] The defendant further contended that even the draft JVA prepared by the plaintiff does not contain the salient and critical terms of a joint venture

which have yet to be negotiated between the plaintiff and the defendant. The substantial commercial terms of the joint venture namely: (a) roles and responsibilities of each party to the joint venture; (b) covenants; (c) restrictions on the shareholders; (d) reserved matters; and (e) events of default have not even been discussed, much less agreed on by the parties.

[12] Thus, since there is no joint venture agreement being concluded between the parties, it was submitted on behalf of the defendant that the plaintiff could not possibly have any legal recourse against the defendant.

[13] In support of its submission, the learned counsel for the defendant relies on several cases namely:

(a) *Ayer Hitam Tin Dredging Malaysia Bhd v YC Chin Enterprises Sdn Bhd* [1994] 2 MLJ 754. The Supreme Court in this case has explained the requirements for the formation of a valid contract:

> In *Smith v Hughes* it was said that *the existence of an agreement depends upon the intention of the parties, and that for there to be an agreement the parties must be ad idem, ie there must be a consensus between them.*
>
> But, bearing in mind the familiar saying that a person's beliefs or his state of mind are just as much facts as the state of his disgestion or the existence of a tangible object, from what factors may the existence of an agreement be inferred? *The authorities show that such inference must be drawn from the language the parties have used, their conduct, regard being had to the surrounding circumstances, and the object of the contract.*
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> *In other words, in its task of ascertaining the intention of the parties, the court will, generally speaking, apply an objective test; more particularly, it will ask itself, what would the intention of reasonable men be if they were in the shoes of the parties to the alleged contract.* (Emphasis added.)

(b) *Courtney and Fairbairn Ltd v Tolaini Brothers (Hotels) Ltd and another* [1975] 1 WLR 297. Lord Denning MR at p 302 stated the following:

> ... I think we must apply the general principle that when there is a fundamental matter left undecided and to be the subject of negotiation, there is no contract.

(c) *MN Guha Majumder v Re Donough* [1974] 2 MLJ 114 (OCJ). The learned judge said:

> It is a well established rule that the parties must make their own contract, and this means that they must agree to its terms with sufficient certainty. If the terms are unsettled or indefinite, there will be no contract (*Chitty on Contract* (23rd Ed, Vol 1) para 83).

[14] On the contrary, the plaintiff has submitted that there is a binding contract between parties herein as the parties were already ad idem without the need of the formal agreement. According to the plaintiff, based on facts specifically pleaded by the plaintiff in its statement of claim that there is a joint venture agreement existing between the plaintiff and the defendant. This is the reason behind the plaintiff's claim for specific performance of the said joint venture agreement.

[15] It was therefore submitted by the plaintiff that in this instance, when the defendant on the other hand has denied the existence of such joint venture agreement or that there is no binding contract between parties, the question whether or not there is a concluded agreement between the parties itself forms a serious triable issue which this court needs to determine upon hearing evidence at the trial.

[16] In this regard, the counsel for the plaintiff has relied on the Court of Appeal decision in the case *Kho Ah Soon v Ooi Kar Seng (Properties) Sdn Bhd* [1995] 3 MLJ 293; [1995] 3 CLJ 812 where the Court of Appeal has agreed with the learned High Court judge's decision to allow an injunction for a serious issue to be tried ie whether there had been a concluded sale and purchase agreement between the parties.

[17] The plaintiff is also in full reliance of a Federal Court case of *Cipta Cermat Sdn Bhd v Perbadanan Kemajuan Negeri Kedah* [2007] 2 MLJ 746; [2007] 1 CLJ 498, wherein Gopal Sri Ram JCA (as he then was), held as follows:

> [7] Let me take the first issue. Learned counsel for the plaintiff argued that there was a concluded contract. He submitted that the parties were already ad idem without the need of a more formal sale and purchase agreement. The defendant's case is that there was no binding contract because the formal agreement had not been signed by both sides. I agree with the plaintiff's submission. I think *there was a concluded contract despite the want of a duly executed formal agreement. Just look at the facts. You have an offer by the defendant. You have an acceptance by the plaintiff. And you have consideration. You also have certainty of parties, certainty of price and certainty of the property. And you have the unequivocal acts of part performance by the plaintiff* which are referable to an existing contract between the parties ...
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> [9] ... *True that no formal contract of sale and purchase was ever executed. But that does not matter. There can be a concluded contract even where the parties contemplate the execution of a more formal document* ...
>
> [10] *So, objectively speaking, the parties had already made a contract and the written agreement was a mere formality* ... Let me now refer to two authorities which are of considerable assistance.

[18] Relying on *Cipta Cermat*'s case, the plaintiff has submitted that in the

present case there is a concluded agreement despite the want of a duly executed formal agreement based on the following facts:

(a) there is an offer/appointment by the defendant;

(b) there is an acceptance by the plaintiff;

(c) there is certainty of parties;

(d) there is certainty of price for the towers;

(e) there is certainty of the subject matter ie towers to be acquired; and

(f) there are unequivocal acts of part performance by the plaintiff whereby the plaintiff had duly performed its obligations under the timeline given as per the project planner.

[19] While it may be true in some cases that the existence of any concluded contract between parties can only be determined only after full trial by calling witnesses to give evidence, but there are also cases that the court can actually determine whether there existed a concluded contract or agreement between the parties from documentary evidence produced in the affidavits by the parties.

[20] Upon all the documentary evidence produced by the parties in the present case, it is this court's finding that it is clear that there is no concluded contract between the plaintiff and the defendant. What was really in existence is instead, the plaintiff's own unilateral step forward with an unwarranted and misconceived view that there is a concluded joint venture agreement although all documentary evidences reflects the complete opposite. This court makes this finding on the following grounds:

(a) the plaintiff in the present case had fully admitted that here there is no formal agreement joint venture agreement executed by the parties; and

(b) the plaintiff in its attempt to prove that there is a concluded joint venture agreement between the parties has mainly and only relied on the following facts that; there is an offer/appointment by the defendant; there is an acceptance by the plaintiff and there is certainty of parties

[21] At this juncture, this court must recapitulate the facts from the sequence of event to determine whether or not that there existed a joint venture agreement between the plaintiff and defendant and if this issue should be determined vide a full trial with witnesses.

[22] Firstly, based on the letter dated 9 November 2014 issued by the defendant to the plaintiff, this letter was a letter inviting the plaintiff to participate in a briefing to the defendant's special investment committee on

16 November 2014 regarding a joint venture project on the construction of telecommunication infrastructure and related facilities in Kedah ('the project'). Besides the plaintiff, there were three other companies present in the briefing.

[23] Secondly, the plaintiff had accepted the invitation and presented its proposal to the defendant.

[24] Thirdly, pursuant to the proposal and representations, the defendant, vide its letter to the plaintiff dated 18 December 2014, had appointed the plaintiff to enter into a *proposed* joint venture with the defendant for the project. Close perusal of the letter reveals that the words used were only indicative of a proposed joint venture agreement without anything being concluded.

[25] Fourthly, by its letter dated 23 December 2014, besides acknowledging the said appointment, the plaintiff had also introduced other conditions of the joint venture which differ from those set out by the defendant. The proposed term particularly pertains to the ratio of directors wherein the plaintiff has proposed the ratio of 3:4 instead of 4:7 as stated in the defendant's earlier letter dated 18 December 2014.

[26] The fifth fact is that the defendant via its letter dated 5 January 2015 forwarded to the plaintiff and Premium Radius, a project planner containing the timelines for the project to be complied with by the parties to the proposed joint venture and a list of telecommunications towers. The project planner stipulates that the purchase of the telecommunications towers in Kedah should only commence in the second week of June 2015.

[27] The sixth fact is that despite the project planner clearly stipulating that the purchase of the telecommunications towers in Kedah should only commence in the second week of June 2015 (six months away from the date of the letter 5 January 2015) and despite the fact that there was no formal joint venture agreement between the plaintiff and the defendant, the plaintiff on its own accord had unilaterally issued the email dated 7 January 2015 to several telecommunications companies stating that the plaintiff was the 'appointed vendor by the State':

> We, being the appointed vendor by the State has been instructed to purchase all existing sites in Kedah within 6 months with the exception of 180 sites belonging to YIKED Bina Sdn Bhd ...

[28] The seventh fact is that, the letter issued by the defendant dated 11 January 2015, to SKMM and other telecommunications providers stated, amongst others, that:

(a) the state of Kedah has given a mandate to the defendant to enter into a joint venture with the plaintiff and Premium Radius to build telecommunications infrastructure in Kedah; and

(b) the telecommunications providers are requested to provide 'kerja-kerja membina insfrastruktur telekomunikasi, menara dan sebagainya' to the plaintiff and Premium Radius effective 6 January 2015.

[29] This court is of the view that this letter was issued merely to inform SKMM that the State of Kedah had merely given a mandate to venture with the two companies stated in the letter, and that the mandate here is not at all at a stage of a conclusive joint venture agreement.

[30] The eighth fact is that, the plaintiff's conduct in issuing the letter dated 12 January 2015 which appends the draft joint venture agreement and a copy of Form 32A of the proposed joint venture company to the defendant is clearly an unwarranted unilateral conduct by the plaintiff which was never in the contemplation, negotiation or even the request of the defendant.

[31] The ninth fact is that, following the contents of YB Mohd Rawi's letter, the disgruntled plaintiff had on 6 May 2015, wrote to the Kedah Menteri Besar, and in this same letter the plaintiff itself admitted that there were never any joint venture agreement concluded. In the same letter, the plaintiff also asked that YB Dato Seri Kedah Menteri Besar to expedite the conclusion of the said agreement.

[32] It is this court's finding that the plaintiff's own letter to the Kedah Menteri Besar has clearly explained the exact position of the relationship between the plaintiff and defendant that there was not yet any conclusive contract between the parties. This position is coherent with the defendant's solicitors' letter dated 7 October 2015 reiterating that there was never any concluded contract between the plaintiff and defendant.

[33] This position can be seen in reference to the case of *Ayer Hitam Tin Dredging Malaysia* whereby the plaintiff in reliance upon the defendant's letter had proceeded to make arrangements for end financing for a project and had even commenced preliminary works on the site. The plaintiff in this case had done so despite the fact that no formal agreement in writing had been executed. All works were executed in the misconceived belief that the defendant's letter constituted a binding contract. However, the Supreme Court held that there was no binding contract (at p 768 of the decision):

> It follows that the letter of 19 September 1984 *on its true construction did not constitute a contract binding in law upon the plaintiff and the defendant but was only a record of terms upon which they were agreed as a basis for the negotiations of a contract.*

A It may aptly be called a letter of intent, the characteristics of which have been accurately described by Fay J at first instance in his judgment in *Turriff Construction Ltd and Turriff Ltd v Regalia Knitting Mills Ltd* 18 at p 22 para 3 thus:

As I understand it such a letter is *no more than the expression in writing of a party's present intention to enter into a contract at a future date. Save in exceptional* B *circumstances it can have no binding effect.*

Later, in his judgment, he restated this proposition (at p 22 para 4) thus:

A letter of intent would ordinarily have two characteristics, one, that it will express an intention to enter into a contract in future and, two, it will itself create no liability in regard to that future contract. (Emphasis added.)

C

[34] This court is in agreement with the submission of the defendant's counsel that in reliance of the decision in *Ayer Hitam Tin Dredging* that the defendant's letter dated 18 December 2014 appointing the plaintiff for the proposed joint venture is essentially a 'letter of intent' containing an 'intention D to negotiate, or a 'record of terms', even if accepted by the plaintiff.

[35] This court also agrees with the counsel for the defendant that since the terms of the joint venture have never been concluded with certainty, there is no E binding contract. Thus, the plaintiff's acceptance of the defendant's offer to enter into a joint venture agreement merely amounts to and is of a similar nature to that of a memorandum of understanding. An MOU is no more than an agreement to negotiate and is unenforceable (see *Abdul Rahim bin Syed Mohd v Ramakrishnan Kandasamy (Wan Ahmad Azlan bin Wan Majid & Anor, interveners) and another action* [1996] 3 MLJ 385 (HC) at p 401): F

It appears to me that considering the MOU as a whole — and in particular, considering the objective of the MOU, particularly the 'genesis of the agreement', and the intention of the parties at the time of the signing of the MOU, the MOU is not a legally binding agreement. It is no more than an agreement to negotiate and G as such, it is unenforceable.

A legally binding agreement, therefore, could only come into force upon the execution of the formal sale and purchase agreement, by which time the parties would have considered all aspects of the sale in detail, and a formal agreement prepared by the solicitors to cover all these aspects of the sale for execution. Until the H execution of the formal agreement — as there is no binding contract between the parties — the parties are at liberty to resile from the so-called agreement without any legal consequences flowing from such an action. Such clearly appeared to be the intention of the parties at the time of the signing of the MOU, and that certainly is the effect of the MOU in law.

I (see also *Kheamhuat Holdings Sdn Bhd v The Indian Association, Penang* [2006] 4 MLJ 656 (CA)).

[36] This court is of the view in this instance, that the defendant has every right to decide not to proceed with the MOU between the plaintiff. More so in

this case, the plaintiff had acted unilaterally without the defendant's knowledge and authorisation by liaising directly with the telecommunications providers via the email dated 7 January 2015. The fact that the email dated 7 January 2015 was sent without copying the same to the defendant adds further probability to the fact that the plaintiff has acted unilaterally and without authorisation.

[37] Thus, based on the foregoing deliberations and findings, it is this court's finding that indeed there is no concluded and binding contract between the defendant and plaintiff. It naturally entails that since there is no existing contract between the parties, obviously there is no cause of action for the plaintiff. It is also this court's finding that owing to the clear and simple evidence and finding of the absence of cause of action, it is unnecessary court to escalate the present case to determine the case vide full trial with witnesses.

THE PLAINTIFF HAS FAILED TO MEET THE REQUIREMENTS IN AN APPLICATION FOR INTERLOCUTORY INJUNCTION; AND

THE PLAINTIFF CANNOT CLAIM FOR INTERLOCUTORY INJUNCTION FOR INTERIM PRESERVATION OF PROCEEDS AND/OR PROFITS

[38] Naturally entailing the absence of cause of action, thus it is also this court's finding that the plaintiff is not entitled to an order for an injunction to prevent the defendant from awarding and/or causing the project to be awarded to a third party until the decision and/or disposal of this action. Nor does the plaintiff has any rights to claim for an interlocutory injunction for interim preservation of proceeds and/or profits from the non existent contract.

[39] It is trite law that before granting an interlocutory injunction there must be a pre-existing cause of action. An interlocutory injunction is ancillary to a cause of action, as explained in the case of *Kanawagi s/o Seperumaniam v Penang Port Commission* [2001] 5 MLJ 433, and in the English case of *American Cyanamid Co v Ethicon Ltd* [1975] 1 All ER 504.

[40] This principle in *American Cyanamid* in granting interlocutory injunction was applied in the case of *Lim Chong Construction Co Sdn Bhd v Silam Quarry Sdn Bhd* [1990] 2 MLJ 423 where Zakaria Yatim J said that an applicant for an interlocutory injunction must show that he has a cause of action (at p 424):

> ... One of the essential requirements for granting an interlocutory injunction, as laid down in *American Cyanamid Co v Ethicon Ltd* [1975] 1 All ER 504 at p 510, is that the court must be satisfied that there is a serious question to be tried. Lord Diplock in his speech in the *American Cyanamid* case envisaged a trial of the action. In *Cayne*

v Global Natural Resources [1984] 1 All ER 225, May LJ at p 237:

> In the *American Cyanamid case* [1975] 1 All ER 504, there was a serious question to be tried between the parties, which could only be resolved by a trial. It was clearly contemplated that there would be a trial. The application for the interlocutory injunction was merely a holding operation pending that trial.

Since a trial is envisaged the plaintiff must show that he has a cause of action. The grant or refusal of an interlocutory injunction therefore depends on whether there is a cause of action.

... In the present case, since there is no cause of action, there is no serious question to be tried. (Emphasis added.)

[41] The requirement of a pre existing cause of action before the relief of interlocutory injunction may be granted was also emphasised by Lord Diplock in the English case of *Siskina (Owners of Cargo Lately Laden on Board) and others v Distos Compania Naviera SA* [1979] AC 210.

Lord Diplock held (at p 256):

A right to obtain an interlocutory injunction is not a cause of action. It cannot stand on its own. It is dependent upon there being a pre-existing cause of action against the defendant arising out of an invasion, actual or threatened by him, of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the court. The right to obtain an interlocutory injunction is merely ancillary and incidental to the pre-existing cause of action. It is granted to preserve the status quo pending the ascertainment by the court of the rights of the parties and the grant to the plaintiff of the relief to which his cause of action entitles, which may or may not include a final injunction. (Emphasis added.)

THE PLAINTIFF DID NOT COME WITH CLEAN HANDS

[42] The defendant submits that an injunction is an equitable relief for which the applicant must not be guilty of any misconduct. In the Court of Appeal case of *Eastern Properties Sdn Bhd v Hampstead Corporation Sdn Bhd* [2007] 6 CLJ 538 (CA), Gopal Sri Ram JCA (as His Lordship then was) explained the applicability of equitable maxims as follows (at p 547):

> It is beyond argument that equitable doctrines are not to be dealt with in a rigid fashion. They are by their very nature flexible and meant to be applied in such a fashion as produces a just result on the facts and circumstances of a given case. But there are certain basic threads that have been woven into the fabric of equitable doctrines through the pronouncements in the leading cases on the subject. *One of these is that a supplicant who prays in aid equitable assistance must himself or herself be not guilty of equitable misconduct. This is sometimes put in the form of the maxim: He who comes to equity must come with clean hands.* So a contract breaker cannot successfully invoke the remedy of specific performance. (Emphasis added.)

[43] Not only that the plaintiff has no cause of action against the defendant, the plaintiff went a step further to conduct a wrongdoing in unilaterally pursuing to bind the non-existent contract against the defendant. The saving arms of equity should not be afforded to the plaintiff as the plaintiff is clearly at fault and not free from faults.

[44] Based on the foregoing reasons, the plaintiff's application in enclosure 5 is dismissed with costs. This court hereby orders the plaintiff to pay the defendant costs of RM10,000.

Enclosure 5 dismissed.

Reported by Ashok Kumar